United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76 - 1324

To be argued by
ROY M. COHN

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B/S

UNITED STATES OF AMERICA,

Appellee,

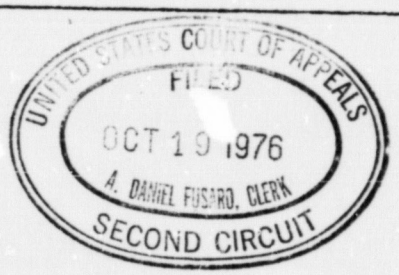
- against -

JACK G. SCHWARTZ and GEORGE SARKIS, a/k/a "George,"

Defendants-Appellants.

ON APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT SCHWARTZ



SAXE, BACON & BOLAN, P.C.
Attorneys for Defendant-
Appellant Jack G. Schwartz
39 East 68th Street
New York, New York 10021
(212) 472-1400

ROY M. COHN
MICHAEL ROSEN
RONALD F. POEPPLEIN

Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA, :

Appellee, :

- against - :

JACK G. SCHWARTZ and GEORGE SARKIS, a/k/a "George," :

Defendants-Appellants. :

----------X

REPLY BRIEF FOR APPELLANT SCHWARTZ

The government's brief* concedes that in "hindsight" it was improper procedure to spring on the jury out of the blue the insinuation by prosecutorial question that the defendant was connected with the "Mafia" ("Isn't it a fact that being connected is common parlance for being connected with the Mafia?")(Tr. 1836**).

The government offers in mitigation three points: (1) that appellant first injected the "organized crime" issue - which argument it will be seen below is totally untenable factually; (2) that the government had the right to explore whether Schwartz was connected with organized crime, as if he were, he would clearly come within a statutory application which we urge: namely, that this law deals with illegitimate

* (p.20, fn. 31)

** References preceded by "Tr." are to pages of the trial transcript.

enterprises exclusively, not legitimate ones; and (3) the ritualistic argument that in any event the Mafia incident was "much ado about nothing."

As to the first point, it was the prosecution witness Jack Taylor - not the appellant - who first deliberately introduced the issue of "organized crime" into the trial. Bear in mind that Taylor had for months been acting in effect as a government agent, having been consistently wired by the F.B.I. and instructed by them even to the extent of being fed statutory language to be repeated to alleged threat makers on government supplied tape.

> "Q (by Mr. Rosen) You had been to the police or to the F.B.I., I do not know which one, prior to April 28?
>
> A (by Mr. Taylor) Right.
>
> Q Which one had you gone to?
>
> A To the police.
>
> Q Suffolk County police?
>
> A Right.
>
> Q And they were the ones who wired you, isn't that correct?
>
> A Right, the Organized Crime Unit.
>
> Q The Organized Crime Unit - you got it in, Mr. Taylor." * (Tr. 1319-1320)

As to the incident in which appellant's counsel clarified through Mignoli that the reference to "guineas" as the source of his introduction to Schwartz, referred to a specific trucker named "Eddie Clarabino," and was not meant

*The judge sustained counsel's objection, stating: "Strike out 'Organized Crime Unit.' They classify different parts of the Department and they give them different names. It has no significance whatsoever and his answer is unresponsive. Only answer what is asked of you, no more." (Tr. 1320)

to refer to some "underworld thing." This preceded considerably the incident to which the government alludes, and concerned a different portion of the tape. Long after this was included and with reference to a different portion of the tape, the prosecutor pressed and pressed until he finally came out with the "Isn't it a fact that being connected is common parlance for being connected with the Mafia?" (Tr. 1736)

As to the third argument, the government's brief writer must be the only person who now thinks this incident was "much ado about nothing." A reading of the trial record recreates the heavily charged atmosphere in which this took place and shows the seriousness with which it was taken by the trial judge and all counsel immediately upon its occurrence. The incident followed an earlier one wherein the prosecutor rose in front of the jury and demanded that the defense witness be advised by the court in front of the jury that he had better get himself a lawyer. "MR. KIMELMAN: Before this witness testifies further he should seek the advice of counsel." (Tr. 1722) The prosecutor apologized for this too.

Indeed, in speaking of the "organized crime" references in Taylor's testimony as cited above in the course of the testimony, combined with the "Mafia" incident, the court stated to counsel:

"THE COURT: Listen, you want to know something?

MR. ROSEN: Yes.

THE COURT: If you get a certain three judges up on that bench, you will get a reversal on that. If you get three other judges, they won't even listen to the point." (Tr. 1899)

The court continued:

"I will tell you what is on my mind. Dean Griswold said that to us in St. Paul. He said it's playing Russian Roulette in some of the benches of the Court of Appeals and I say Amen to that." (Tr. 1899)

As of the writing of this brief, we do not know the composition of the panel and based on the trial court's experience we are apparently relegated to the Russian Roulette game. But we respectfully submit that the exposure is substantially reduced by the authority of United States v. Love, 534 F.2d 87 (6th Cir. 1976), and by the factual pattern of the "organized crime" references in front of the jury, particularly in view of the closeness of the case which resulted in the defendant's acquittal on two of the three counts.

The other argument on this point to the effect that the government had the right to probe whether Schwartz was connected with the Mafia, as, if he were, the statutory interpretation of limitation to illegitimate enterprises would thusly be met. This would be all well and good if the questions were asked in good faith and if the government had evidentiary reason to believe that such an affiliation were the fact. Such has never occurred in this case and the

government at all times knew that it could never in good faith allege that Schwartz had any connection whatsoever with organized crime. Prior to the trial Schwartz handed over lists of the hundreds of customers Gaines has and has had and the F.B.I. made a thorough investigation, all of which produced not one incident or association not charged in the indictment. Indeed, Schwartz himself took the stand and was extensively cross-examined but at no time was any line of questioning pursued to this effect because none could be in good faith. To argue now that the Mafia question was justified because of our argument on statutory application is absurd.

The government attempts to further link Schwartz with organized crime and justify the question by reference to such words as "muscle" and "connected." As pointed out in appellant's main brief (p. 11, fn.), "Connected"is an equivocal word and can have the connotation that Mignoli ascribed to it - with whom one does business. As we pointed out at the next day of trial, such a sinister publication as the New York Daily News described presidential candidate Jimmy Carter as being provided with "muscle" in the Michigan primary (Tr. 1897- 1898). (It should be noted that this entire conversation, whether threatening or not, was not authorized by Schwartz, nor was it even suggested that he had any knowledge of it before or after it took place.

The government further attempts to minimize the prejudicial effect of the question by asserting (p. 13) that Mignoli was called "to prove the bad character of the victims

McGhee and Taylor." Nothing could be further from the truth. Mignoli was a key factual witness as to certain events of which few other people were aware. This is amply demonstrated in the record.*

The sufficiency of the evidence argument must fail in that the government has done nothing more than pay lip service to the time-worn arguments that all evidence must be viewed in a light most favorable to the government and all reasonable inferences must be drawn in its favor. Unfortunately the government's brief fails to address the specific issues of appellant's brief. It is strange that the government, which attempts to rely so heavily upon the statements of Judge Mishler throughout its brief, fails to respond to appellant's arguments on this point, when in fact the appellant urges the acceptance of Judge MIshler's own charge as supportive of his position.**

---

* As to Mignoli's alleged perjury (p. 12, fn. 26) we submit that most judges believe that all witnesses are lying part of the time or that some witnesses are lying all of the time.

** On several occasions, the government conveniently refers to "evidence" of alleged "threats" to Taylor. However, as the jury acquitted both appellants of the Taylor count, the only logical explanation for the government's reference thereto is obviously to prejudice the appellant in the eyes of this Court. Any reference to Taylor's factual assertions should thus be rejected out of hand as a meaningless attempt to prejudice Schwartz in the eyes of this Court.

The government lays great stress upon a series of conversations involving McGhee. What the government fails to point out is that these conversations have no bearing on the case. According to the McGhee count of the indictment, the sequence of events had to be:

(1) threats of violence, and

then, and only then

(2) actual physical harm to property.

Since the only physical act at all referable to McGhee occurred on April 23, 1975, the actual threats must have predated the fire. Even assuming that these later conversations could be deemed to contain threats, they would be irrelevant.

As to the applicability of the statute (18 U.S.C. §894), appellant wishes to merely reaffirm the position enunciated in his main brief. However, we would like to comment upon the government's misconstruction of our argument as set forth at p. 28, fn. 37 of its brief. The government knew there was no proof that Schwartz was at all linked to the underworld or organized crime. We submit that they are now attempting to bolster the applicability of 18 U.S.C. §894. When the prosecutor asked if Mignoli meant Schwartz was connected with the Mafia, this only served as a meager attempt to extend the ambit of §894 to include Schwartz. This question, coupled with the government's argument as to the applicability of §894 only serves to strengthen appellant's position.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed.

Dated: New York, New York
October 18, 1976

Respectfully submitted,

SAXE, BACON & BOLAN, P.C.
Attorneys for Defendant-
Appellant Jack G. Schwartz
39 East 68th Street
New York, New York 10021
(212) 472-1400

Saxe, Bacon & Bolan P.C.

Roy M. Cohn
Michael Rosen
Ronald F. Poepplein

Of Counsel

RECEIVED
U.S. ATTORNEY
OCT 19 11 34 AM '76
EAST. DIST. N.Y.

Paula
Jaramillo